

STATE OF MICHIGAN  
IN THE SUPREME COURT

Appeal from the Court of Appeals  
(Murphy, C.J., and O'Connell and Beckering, JJ.)

WAYNE COUNTY EMPLOYEES RETIREMENT  
SYSTEM and WAYNE COUNTY RETIREMENT  
COMMISSION,

Docket No. 147296

Plaintiffs-Counterdefendants-  
Appellees,

Court of Appeals No. 308096

v

Wayne County Circuit Court  
LC No. 10-013013-AW  
Hon. Michael F. Sapala

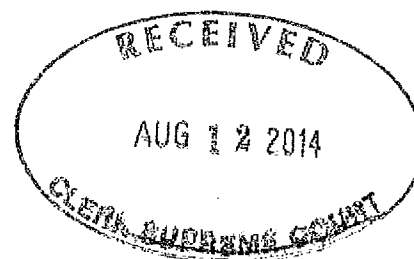
CHARTER COUNTY OF WAYNE,

Defendant-Counterplaintiff-Appellant,

and

WAYNE COUNTY BOARD OF COMMISSIONERS,

Defendant-Appellant.



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**DEFENDANTS-APPELLANTS WAYNE COUNTY AND  
WAYNE COUNTY BOARD OF COMMISSIONERS' REPLY BRIEF**

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## I. ARGUMENT

Time and again, this Court has affirmed that “[s]tatutes are presumed valid; the burden of rebutting that presumption is on the person challenging the statute.” *Detroit v Qualls*, 434 Mich 340, 352 n 21; 454 NW2d 374 (1989) (citations omitted). “The presumption of validity also applies to . . . ordinances.” *Id.* Yet Plaintiffs fail to acknowledge this foundational truth and over-stretch the provisions of both PERSIA and Const 1963, art 9, § 24 in defense of the Court of Appeals’ decision to invalidate the 2010 ordinance. Nothing in either the Michigan Constitution or PERSIA (or any other Michigan statute for that matter) prohibits the credit and offset provided by the 2010 ordinance, and Plaintiffs have otherwise failed to overcome the presumption that the ordinance is valid. This Court must allow the duly-enacted 2010 ordinance to stand, and reverse the Court of Appeals’ contrary decision.

### A. **The 2010 ordinance does not infringe upon the authority PERSIA grants to retirement system trustees.**

Plaintiffs assert that in discussing its authority to amend the provisions of its retirement system by ordinance, Wayne County has “answered a question different from the one this Court asked.” (Ps’ Br at 19). Plaintiffs claim that although Wayne County may be empowered to make “forward-looking” changes to its retirement system, it does not have the authority to “move assets held in trust by a retirement system” because PERSIA provides that those “trust” assets “are to be administered and managed by the Trustees [of the Wayne County Retirement Commission].” (See P’s Br, pp 19-26 and 32-33). Such an argument not only mischaracterizes what the 2010 ordinance actually does, but demonstrates Plaintiffs’ fundamental misunderstanding of the County’s legislative authority, as the employer and trust settlor, to make *structural changes* to the overall plan design of its retirement system, including to the very same IEF that the County created in the first place.

As explained in its brief on appeal (pp 20-23), Wayne County's authority to modify the structure and framework of its retirement system is firmly rooted in the Michigan Constitution, the Charter Counties Act, and the Wayne County Charter. Wayne County used that authority in 1986 when, by ordinance, it *created the IEF* and established a manner for funding it through transfers from the system's defined benefit plans. Through the 2010 ordinance, Wayne County simply directed that some of that money be transferred back into the defined benefit plans from where it came. Despite Plaintiffs' suggestion, the 2010 ordinance did not move assets *out* of the "trust." They were at all times held in trust in the retirement system. The ordinance merely directed the transfer of assets from one fund *within the trust* (the IEF) to another (the defined benefit plans), in the same manner that the funds were transferred from the defined benefit plans to the IEF in the first instance. This was precisely the sort of "modification of the system" that the Michigan Constitution, the Charter Counties Act, and the Wayne County Charter specifically authorize the County to make, albeit "[s]ubject to law." Under this Court's precedents, it is *Plaintiffs' burden* to overcome the presumption of validity that attaches to the County's action. In asserting otherwise, Plaintiffs have flipped the burden on its head.

The Court of Appeals found that the 2010 ordinance violated PERSIA's "exclusive benefit" and "prohibited transaction" provisions, and the County will address Plaintiffs' position on those issues momentarily. But first, it is necessary to dispose of Plaintiffs' flawed argument that the transfer of funds somehow contravened the Retirement Commission's authority and discretion under PERSIA to make "administrative and managerial decisions" concerning retirement system assets. (Ps' Br at 23-25). The County does not dispute that the Commission is responsible for the "general administration, management, and operation" of the retirement system and its assets, as the Court of Appeals observed in *Board of Trustees of the Policemen & Firemen Ret Sys v City of Detroit*, 270 Mich App 74, 75; 714 NW2d 658 (2006) ("*City of*

*Detroit-2006*”). But what the Commission seems to forget is that it “manages” and “implements” the County’s system. As federal courts recognize in the analogous ERISA context, an employer’s decision to “transfer plan assets” is a “business decision” relating to plan *design*, and has nothing to do with “plan management or administration, or those acts designed to carry out the very purpose of the plan.” *Hunter v Caliber Systems, Inc*, 220 F3d 702, 718-720 (CA 6, 2000). See also *Hughes Aircraft Co v Jacobson*, 525 US 432, 444; 142 L Ed 2d 881; 119 S Ct 755 (1999) (“An employer’s decision to amend a pension plan concerns the composition or design of the plan itself and does not implicate . . . the administration of the plan’s assets.”).

The result is no different under PERSIA. As even the Court of Appeals panel in this case conceded, nothing in PERSIA or the case law applying it precludes a county from changing the “structural aspects” of a plan. See *Wayne County Employees Ret Sys v Charter County of Wayne*, 301 Mich App 1, 54; 836 NW2d 279 (2013) (recognizing that ordinance provisions concerning “retirement plan parameters and structural aspects of the plan . . . are legislative in nature and within the purview of the County Board”). For that reason, the Court of Appeals had no choice but to uphold the 2010 ordinance’s caps on the amount of money that can be held in the IEF (\$12 million) and that can be distributed to retirees annually in the form of discretionary 13th checks (\$5 million). In providing for a purely intra-system transfer of funds from the IEF to the defined benefit plans (with or without a corresponding offset to the County’s ARC), the 2010 ordinance no more interfered with the Retirement Commission’s authority to manage the assets of the “system” than placing restrictions on its ability to distribute 13th checks. To accept a contrary view of the 2010 ordinance would require treating the IEF as though it were its own separate retirement “system,” deserving of special protection, instead of what it is — one of several funds *within* the Wayne County Retirement System.

Plaintiffs cite *Retired Detroit Police & Fire Fighters Ass'n v Detroit Police Officers Ass'n*, unpublished opinion per curiam opinion of the Court of Appeals, issued December 16, 2010 (Docket No. 293998), as a case that “illustrates” their position, but *Detroit Police Officers Ass'n* merely recognized that the retirement board has discretion to offset an employer’s annual required contribution (“ARC”) under MCL 38.1140m. *Id.* at \*9. Plaintiffs rely on *Detroit Police Officers Ass'n* to argue that only the trustees of a retirement system may “permit an offset of trust assets” (Ps’ Br at 23). That reliance is misplaced when it comes to the credit and offset provided under the 2010 ordinance. This is because MCL 38.1140m *does not apply to the assets in the discretionary IEF*. Rather, the statute applies only to offsets using *defined benefit plan* assets, as the Court of Appeals panel in this case acknowledged. *Wayne Co*, 301 Mich App at 54 (“MCL 38.1140m appears to only address ARCs relative to defined benefit plans . . .”).<sup>1</sup>

Plaintiffs also cite *Board of Trustees of the Policemen & Firemen Ret Sys v City of Detroit*, unpublished opinion per curiam of the Court of Appeals, issued June 2, 2005 (Docket No. 260069) (“*City of Detroit-2005*”), and *City of Detroit-2006*, 270 Mich App 74, for the proposition that PERSIA “preclud[es] the involvement of parties in interest like the County in intra-system financial decision-making.” (Ps’ Br at 24). But once again, those cases are inapplicable. *City of Detroit-2005* held that the City of Detroit was required under the city’s code and charter to make contributions to its policemen/firemen retirement system as determined by the system’s board of trustees, which was authorized to “determine[] the contribution rate based on actuarial data and reports.” *City of Detroit-2005*, 2005 Mich App LEXIS 1387, \*7, 10-11. That has nothing to do with this case, as the credit and offset provided under the 2010 ordinance in no way implicates the Retirement Commission’s authority to determine the County’s ARC under PERSIA.

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<sup>1</sup> Wayne County further addresses this distinction on page 36 of its brief on appeal.

Equally beside the point is *City of Detroit-2006*, 270 Mich App 74, which addressed a conflict between the Detroit city charter and PERSIA relating to the amortization period to be used in calculating the City of Detroit's ARC. Wayne County does not dispute that it has an obligation to pay its ARC, or that the Retirement Commission has the authority to determine it. The 2010 ordinance simply helps satisfy the County's obligation to pay its ARC by authorizing the transfer of funds from the IEF to the defined benefit plans to serve as a partial offset. Nothing in PERSIA even remotely suggests that there is anything improper about doing that.

**B. The 2010 ordinance does not violate Const 1963, art 9, § 24.**

Wayne County addressed Const 1963, art 9, § 24 in its brief on appeal for two reasons. First, the Charter Counties Act and the Wayne County Charter – upon which the County relies to support the enactment of the 2010 ordinance – both prohibit impairing accrued benefits. Second, although the Court of Appeals did not find that the 2010 ordinance violated art 9, § 24, it suggested in dicta that “from a broad perspective, taking into consideration not individual retirees or survivor beneficiaries but all of them together as a group, the 13th-check program itself could arguably be viewed as an accrued financial benefit for purposes of the first clause contained in Const 1963, art 9, § 24, which benefit was diminished and impaired by the transfer of \$32 million out of the IEF.” *Wayne County*, 301 Mich App at 35 n 23; see also *id.* at 40. This is dangerous precedent that cannot be allowed to stand.

With regard to the first paragraph of art 9, § 24 (what Plaintiffs call the “nonimpairment clause”), Wayne County stands on the arguments it made in its brief on appeal, to which Plaintiffs have not even responded.<sup>2</sup> As for Plaintiffs’ claim that the 2010 ordinance violates the

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<sup>2</sup> Instead, Plaintiffs apparently intend to rely on arguments to be made in yet-to-be-filed amicus briefs. If and when leave is sought to file such amicus briefs, Wayne County will respond as needed. In the meantime, Wayne County suggests that the practice of relying on amicus briefs to advance arguments is questionable. See, e.g., *Ile v Foremost Ins Co*, 293 Mich App 309, 328; Footnote continued on next page ...

second paragraph of art 9, § 24 (the so-called “annual funding clause”), that argument is also meritless. Wayne County *did* pay its ARC. The fact that a *portion* of the ARC was satisfied via a transfer of funds from the IEF back into the defined benefit plans and corresponding offset does not change the fact that the ARC was paid. In fact, the result is no different than under MCL 38.1140m, which authorizes offsets of an employer’s ARC that are functionally the same as that provided under the 2010 ordinance. In either case, the net result is a reduced ARC. Presumably, the Legislature was aware of art 9, § 24 when it passed MCL 38.1140m. The 2010 ordinance is no more a violation of the annual funding clause than is MCL 38.1140m.

In support of their claim, Plaintiffs primarily rely on *Shelby Twp Police and Fire Retirement Bd v Shelby Twp*, 438 Mich 247; 475 NW2d 249 (1991), but that case stands for the unremarkable proposition that “Art 9, § 24 expressly mandates townships and municipalities to fund all public employee pension systems to a level that includes unfunded accrued liabilities,” as opposed to funding “only pensions payable in that year to current retirees and beneficiaries.” *Id.* at 255. Nothing in *Shelby Twp* purports to address the issue presented here, i.e., whether there is anything impermissible about transferring assets from the discretionary IEF into the defined benefit plans as a partial offset to Wayne County’s ARC (which again is functionally identical to the offset permitted under MCL 38.1140m). Indeed, *Shelby Twp* expressly acknowledged that “the Michigan Constitution does not provide the specifics for meeting the funding obligations upon a retirement plan’s unfunded accrued liabilities.” *Id.* at 256.

Plaintiffs also maintain that using funds from the IEF as a credit and partial offset of the County’s ARC is a “borrowing scheme” like the one disapproved of in *Shelby Twp*, but that is clearly wrong. Under *Shelby Twp*, a “borrowing scheme” is one where the municipality “pay[s]

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809 NW2d 617 (2011), rev’d on other grounds, 493 Mich 915 (2012) (criticizing party’s attempt to “‘agree[] . . . and incorporate[] by reference’” arguments advanced in an amicus brief).

off unfunded accrued liabilities with appropriations from current service cost contributions.” *Id.* at 255. The transfer of funds from one part of the retirement system (the discretionary IEF) to another (the constitutionally-protected defined benefit plans) is not the “borrowing scheme” to which *Shelby Twp* was referring. To the contrary, funds that otherwise would have been used for discretionary 13th checks will instead be used to make required defined benefit plan payments.<sup>3</sup>

**C. The 2010 ordinance does not violate PERSIA.**

**1. Plaintiffs fail to provide any support for the Court of Appeals’ strained interpretation of PERSIA’s “exclusive benefit” rule.**

Plaintiffs’ brief also fails to explain how the transfer of assets from the discretionary IEF back into the defined benefit plans resulted in the “assets” of the *retirement system* being used for anything other than the “exclusive benefit” of the participants and their beneficiaries. Plaintiffs’ analysis (as well as that of the Court of Appeals) is premised on the flawed belief that somehow the assets of the *discretionary IEF* are to be treated separately from the rest of the assets in the retirement system and held inviolate, when in fact the IEF is merely a fund *within the retirement system*, just like the defined benefit plans and defined contribution plan (except, of course, that the IEF does not pay accrued benefits).

MCL 38.1133(6) is straightforward in saying that “assets” of a *retirement system* shall be for the “exclusive benefit of the participants and their beneficiaries.” That language means what it says: so long as the retirement system’s “assets” are not “shared with others” (applying the Court of Appeals’ own definition of “exclusive”), there is no violation of MCL 38.1133(6). Here, the 2010 ordinance merely reallocated assets from the retirement system’s IEF to the

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<sup>3</sup> In an attempt to provide support for their “borrowing scheme” theory, Plaintiffs point to language in § 141-32(f) of the 2010 ordinance (Ps’ Br at 30-31) directing Wayne County’s chief financial officer to “explore and report” on whether it is feasible to “reimburse” the IEF at some point. Plaintiffs fail to acknowledge that nothing in § 142-32(f) *requires* Wayne County to do so. Thus, Wayne County did not “borrow” anything. *Shelby Twp* simply has no application.

retirement system's defined benefit plans. At all times, those "assets" were used for the "exclusive" purpose of paying benefits. All that changed is that *the discretionary IEF bonus fund was reduced*. Even the Court of Appeals was forced to concede that "the excess assets, once part of the IEF and now part of the defined benefit plan assets on the accounting records, were still to be used for the benefit of participants and their beneficiaries in the form of regular pension payments." *Wayne County*, 301 Mich App at 32 (emphasis added). As a result, there simply was no violation of the exclusive benefit rule.

The United States Supreme Court made this very point in *Hughes*, holding that because there was (as here) no claim that "Hughes used any of the assets for a purpose other than to pay its obligations to the Plan's beneficiaries, Hughes could not have violated [ERISA's exclusive benefit rule]." *Id.* at 442-443. Plaintiffs say that "avoidance of the mandatory annual funding obligation" is not an "incidental benefit" (Ps' Br, pp 41-42), but this misses the point of *Hughes*. *Hughes* simply held that "the [exclusive benefit rule] focuses exclusively on whether fund assets were used to pay pension benefits to plan participants." *Hughes*, 525 US at 442. Thus, under *Hughes*, whose analysis is entirely consistent with MCL 38.1133(6), there is no violation of the exclusive benefit rule if – as here – retirement system assets are not used "for a purpose other than to pay [the systems'] obligations to [its] beneficiaries." *Id.* at 443.<sup>4</sup>

Plaintiffs also fail to distinguish *Claypool v Wilson*, 4 Cal App 4th 646; 6 Cal Rptr 2d 77 (1992). Like *Hughes*, *Claypool* held that California's exclusive benefit rule was not violated when the California legislature directed that former supplemental COLA funds be used to "offset contributions otherwise due from [public employers to the California Public Employees' Retirement System]." *Id.* at 652, 660-661. This is because the funds "continue[d] to be 'held for

<sup>4</sup> Plaintiffs also make much of the fact that *Hughes* involved a "pension surplus," but nowhere did *Hughes* suggest that its analysis turned on whether the assets at issue are "pension surplus."

the exclusive purposes of providing benefits to participants.” *Id.* at 674 (citation omitted). The credit and offset under the 2010 ordinance is no different. In an effort to avoid *Claypool*’s commonsense holding, Plaintiffs try to distinguish *Claypool* by focusing on superficial factual distinctions. But *Claypool*’s rationale is both compelling and consistent with the Supreme Court’s decision in *Hughes*, and applies equally to this case.

**2. Plaintiffs similarly fail to provide any support for the Court of Appeals’ conclusion that the 2010 ordinance constituted a prohibited “transaction.”**

Nor did the transfer of assets from the IEF to the defined benefit plans (again, with or without a corresponding offset) constitute a prohibited “transaction.” The essence of Plaintiffs’ criticism of the County’s textual analysis of PERSIA’s prohibited transaction rule is that it “does not cite a single case and merely cites the PERSIA provision.” (Ps’ Br, p 44). But it is axiomatic that “the search for legislative intent begins and ends in the language of the statute.” *People v Morton*, 423 Mich 650, 655; 377 NW2d 798 (1985). As discussed in Wayne County’s brief on appeal (see pp 44-48), the 2010 ordinance did not cause a prohibited “transaction” under PERSIA because Wayne County neither “used” retirement system “assets,” nor were retirement system assets “used for the benefit of” the County. The “assets” were “used” solely to pay benefits to retirement system participants and their beneficiaries.

Plaintiffs cite no authority in asserting that prohibited “transactions” can include purely *intra-system transfers* like that at issue. Instead, Plaintiffs cite inapposite cases addressing “transactions” between plans and plan sponsors that are in stark contrast to this case. For example, in *Comm’r of Internal Revenue v Keystone Consol Indus, Inc*, 508 US 152; 113 S Ct 2006; 124 L Ed 2d 71 (1993), the employer exchanged certain truck terminals and real property to its defined benefit plan in lieu of satisfying its funding obligation. *Id.* at 154-155. The other prohibited transaction cases by Plaintiffs are similarly inapplicable. See *Baizer v Comm’r of*

*Internal Revenue*, 204 F3d 1231 (CA 9, 2000) (holding that plan fiduciary transferred accounts receivable to a defined benefit plan in lieu of satisfying its funding obligation); *Peek v Comm'r of Internal Revenue*, 140 TC 12, 2013 US Tax Ct LEXIS 12 (2013) (holding that a loan or loan guarantee between a plan and a disqualified person, even if it goes through a third party proxy, constitutes a prohibited transaction); *Rollins v Comm'r of Internal Revenue*, TC Memo 2004-260 (Memo Dec 2004) (involving plan loans to companies partially owned by a disqualified person)). Unlike these cases, the 2010 ordinance did not result in any “transaction,” either between the retirement system and the County, or between the retirement system and a “third party proxy.”

**3. MCL 38.1140m proves the 2010 ordinance does not violate PERSIA**

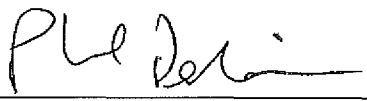
To see that the 2010 ordinance does not violate PERSIA’s “exclusive benefit” or “prohibited transaction” provisions, one need only to examine MCL 38.1140m, which explicitly provides for a similar offset to an employer’s ARC. (See Wayne County’s Br, pp 36-37, 48-49). Plaintiffs argue that MCL 38.1140m does not support the County’s position because it refers to discretionary action by a retirement board when a plan is overfunded. (Ps’ Br at 37-38, 47). But this misses the point, which is that the ARC offset provided under the 2010 ordinance can no more be a violation of the “exclusive benefit” rule or a prohibited “transaction” than the one provided for in MCL 38.1140m.

**II. CONCLUSION**

This Court should reverse the Court of Appeals’ published decision and reinstate the Wayne County Circuit Court’s decision granting summary disposition to Wayne County.

Respectfully submitted,

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